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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

R.A.V.

v.

ST. PAUL, MINNESOTA

On Appeal from the Supreme Court of Minnesota

BRIEF OF *AMICI CURIAE* ASSOCIATION OF AMERICAN PUBLISHERS AND FREEDOM TO READ FOUNDATION

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INTEREST OF AMICI CURIAE *

The Association of American Publishers, Inc. ("AAP") is the major national association in the United States of publishers of general books, textbooks and educational materials. Its over two hundred members include most of the major commercial book publishers, including university presses and scholarly associations. AAP's members publish works which run the gamut of published materials, including non-fiction, biography, history and fiction.

The Freedom to Read Foundation ("Foundation") is a non-profit organization established in 1969 by the American Library Association ("ALA"). The ALA is the oldest and largest library association in the world and the chief voice of the modern library movement in North America. ALA's membership includes more than 3,000 libraries and more than 47,000 individuals, primarily li-

* Both parties have consented to the filing of this *amici* brief.

brarians. The ALA established the Foundation in order to promote and defend First Amendment rights; foster libraries as institutions fulfilling the promise of the First Amendment for every citizen; support the right of libraries to include in their collections and make available to the public any work they may legally acquire; and set legal precedent for the freedom to read of all citizens.

AAP and the Foundation are participating as *Amici* in this case because the lower court's misapplication of the overbreadth doctrine threatens to erode this vital principle of First Amendment jurisprudence. The overbreadth doctrine is critically important to publishers and libraries, whose very reason for existence is to engage in activities protected by the First Amendment.

Given the scope of the First Amendment activities engaged in by publishers and libraries, their interests are often implicated by statutes enacted to regulate or prohibit speech activities. In many instances, these statutes, even if well intentioned, are not narrowly drawn and as a result impermissibly restrict a substantial amount of constitutionally protected speech.

The First Amendment overbreadth doctrine is essential to protect publishers and libraries from the chilling effect of overbroad statutes. In most instances, these statutes do not result in actual prosecutions of publishers or librarians, who therefore cannot directly challenge the overbreadth of the statutes' express terms. And in all but the most extreme cases, a declaratory judgment action, which may involve years of litigation, is simply not a practical option. This is especially true for libraries, most of which are publicly funded and operated. Public libraries are naturally reluctant to use scarce tax dollars to finance litigation challenging state statutes, and because they are dependent on government support, they understandably fear the political fallout that would result if they challenge actions of the legislature.

For the vast majority of publishers and librarians, the only practical response to an overbroad criminal statute is compliance with the literal terms of the statute. Most publishers and librarians will not risk violation of a criminal statute and should not be expected to take that risk. Instead, they are compelled by overbroad statutes to forego First Amendment rights.

The overbreadth doctrine protects publishers and librarians from this chilling effect by permitting a defendant prosecuted under an overbroad statute to challenge its overbreadth even if the statute would be constitutional as applied to that defendant. Thus, if a statute unconstitutionally proscribes protected activities of publishers and librarians, the overbreadth doctrine assures that at an early opportunity, the statute will either be narrowly construed to cure the overbreadth or will be found unconstitutional.

The problem in this case is that the lower court has misapplied the overbreadth doctrine in a manner that does not cure the overbreadth of the St. Paul ordinance, but instead perpetuates its infirmities. In its haste to sanction Petitioner's reprehensible conduct, the lower court has shown that hard cases can indeed make bad law. Because this misapplication of the overbreadth doctrine threatens the First Amendment interests of the Association of American Publishers and the Freedom to Read Foundation, they are participating as *Amici* to urge reversal of the lower court's decision.

SUMMARY OF ARGUMENT

The reprehensible conduct that resulted in this prosecution is clearly within the power of the State to punish. This conduct can be constitutionally punished under state statutes that have been adopted throughout the country to criminalize precisely this type of conduct, or under more general criminal statutes, such as trespass or assault laws. Indeed, regardless of the disposition of this

petition, Petitioner will be prosecuted in Minnesota for violation of the State's assault statute, Minn. Stat. § 609.2231, and criminal attempt statute, Minn. Stat. § 609.17, neither of which is at issue here.

If the State of Minnesota had followed the approach of many states and enacted carefully tailored legislation criminalizing cross burning or similar conduct on the property of an unconsenting third party, or had prosecuted under a statute that does not target expressive activity, this case would not be here. Instead, the prosecution amended its juvenile petition to add a count based on a local ordinance that broadly prohibits speech and expressive conduct that "one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." St. Paul Ord. 292.02.

In doing so, Minnesota effectively invited the courts to address the overbreadth of this criminal ordinance. Thus, the fact that this Court is now confronted with substantial constitutional questions that could easily have been avoided, reflects no infirmity in the First Amendment's overbreadth doctrine; it results from the State's decision to prosecute under an overbroad ordinance. *Point I.A.*

The overbreadth doctrine is a crucial element of First Amendment jurisprudence, fundamental to the preservation of First Amendment rights. The particular facts of this case must not be used to erode the protection of First Amendment rights afforded by this doctrine. *Amici* therefore urge the Court to resolve this case in a manner that preserves the vitality of the First Amendment overbreadth doctrine. This doctrine encourages legislatures to act with restraint in criminalizing speech and expressive conduct and protects the First Amendment rights of *Amici's* membership—publishers and librarians whose First Amendment rights are often subject to overbroad regulation, and who may be forced to compromise those rights rather than risk noncompliance with criminal

statutes. Regardless of the outcome of this case, it is critical that the protection afforded by the overbreadth doctrine be retained. *Point I.B.*

The lower court did not dispute Petitioner's claim that the ordinance, as written, is substantially overbroad. Indeed, on its face the ordinance encompasses not only expressive conduct, but also pure speech on public or private property (including the speaker's property). Although the lower court appropriately criticized Petitioner's conduct, it lost sight of the fact that the ordinance criminalizes a substantial amount of political speech and expressive conduct that requires First Amendment protection precisely because it *is* controversial and arouses "anger, alarm or resentment." For example, much of the expressive and peaceful conduct by blacks seeking equal rights in the South during the 1950's and 1960's aroused anger, alarm, resentment, and often violent reactions, on the basis of race—yet this Court consistently and emphatically recognized that the expressive conduct by these black citizens was at the very heart of the First Amendment. *Point II.A.*

In its zeal to cure the ordinance's overbreadth so that Petitioner could constitutionally be prosecuted under it, the lower court essentially rewrote the statute by incorporating, though inaccurately, this Court's decisions in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) and *Brandenburg v. Ohio*, 395 U.S. 444 (1969). This almost tautological approach to curing statutory overbreadth is particularly troublesome in this case, because the lower court incorporated *selected language* from the *Chaplinsky* and *Brandenburg* cases, without regard to the context in which that language was used at the time, and without regard to doctrinal developments in the half-century that has followed *Chaplinsky*, and the two decades that have followed *Brandenburg*. Far from curing the overbreadth of St. Paul's "hate-speech" statute, the lower court's incorporation of selected language from *Chaplinsky* and

Brandenburg has produced an ordinance that, even as construed, is overbroad and cannot survive First Amendment scrutiny. *Point II.B.*

ARGUMENT

I. THE VITALITY OF THE FIRST AMENDMENT OVERBREADTH DOCTRINE MUST BE PRESERVED.

A. Criminal Punishment of Petitioner's Conduct Does Not Require Overbroad Legislation or Restriction of the Overbreadth Doctrine.

Petitioner's conduct was repugnant and deserves punishment. The lower court recognized this in observing that Petitioner's cross burning was "deplorable conduct that the City of St. Paul may without question prohibit." *In re Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1987). *Amici* wholeheartedly agree with that conclusion. The lower court erred, however, in concluding that St. Paul Ordinance § 292.02 is a constitutionally permissible means to exercise this state power. That conclusion is not required to protect the State's interest, and is not permitted by the First Amendment.

There are ample means available to states that wish to criminalize conduct of this type. Indeed, states across the country have passed statutes that specifically criminalize cross burning and similar conduct. For example, states have passed criminal statutes that prohibit: (a) burning a flaming cross with intent to terrorize another or another's household, O.C. Ga. § 16-11-37(b) (1989); (b) burning a flaming cross on property of another without consent, Fla. Stat. § 876.18; (c) damaging, destroying or defacing any real or personal property of another, Idaho Code § 17-7902(b); and (d) knowingly or recklessly attempting to put another in fear of bodily violence by placing a burning cross or swastika on their property, N.J. Stat. §§ 2C:33-10 (1987). Such misconduct can also

be regulated by more general criminal statutes, such as statutes prohibiting trespass on the property of another, statutes punishing assault, or statutes making it unlawful to set fires on the property of another.

Thus, it is clearly within a state's authority to criminalize Petitioner's conduct in this manner. It is equally clear that the Minnesota criminal code already provides ample means to punish this conduct without relying on St. Paul Ordinance § 292.02. Indeed, in this prosecution, Petitioner has also been charged with violation of the state's criminal assault statute, Minn. Stat. § 609.2231 Subd. 4, and the state's criminal attempt statute. Minn. Stat. § 609.17. Petitioner has not questioned the constitutionality of these assault and attempt statutes. Thus, regardless of the outcome of this petition, Petitioner will be prosecuted.[1]

In fact, Petitioner was not initially charged with a violation of the ordinance at issue here. Petitioner was originally charged with violation of the State assault and attempt statutes, and a different local ordinance. The State then amended its petition to include prosecution under the ordinance at issue here, which criminalizes expressive conduct that arouses "anger, alarm or resentment in others" based on race, religion or gender.[2]

By relying on an ordinance that broadly targets both expressive conduct and pure speech, *see Point II.A infra*,

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[1] There are other Minnesota criminal statutes that Petitioner might have been charged with violating. *See* Minn. Stat. § 609.595, Subd. 2 (criminal damage to property); Minn. Stat. § 609.563, Subd. 2 (arson in the third degree); Minn. Stat. § 609.746, Subd. 3 (intrusion on privacy); Minn. Stat. § 609.713, Subd. 1 (terroristic threats); St. Paul Ord. § 292.01 (similar to St. Paul Ord. § 292.02, but limited to intentional or reckless conduct putting another in fear of immediate bodily harm or death). *Amici* express no view as to the constitutionality of these statutes.

[2] The charged violation of St. Paul Ordinance § 292.02 replaced the charged violation of St. Paul Ordinance § 292.01.

the State injected overbreadth issues into this case. If the government had enacted a narrow statute or ordinance similar to those enacted in many other states, or if the prosecution had relied only on general criminal statutes that did not target speech or expressive conduct (such as the Minnesota assault statute), this case would not raise substantial constitutional questions. By virtue of the government's decision to include a count based on an ordinance that criminalizes a broad range of expression, the courts are necessarily, and quite appropriately, required to determine whether that ordinance is unconstitutionally overbroad.

B. The Overbreadth Doctrine is an Essential Part of This Court's First Amendment Jurisprudence.

The First Amendment overbreadth doctrine stems from this Court's longstanding recognition "that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973). As the Court explained in *Speiser v. Randall*, 357 U.S. 513, 525 (1958), "[t]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn." Accordingly, "[t]he separation of legitimate from illegitimate speech calls for . . . sensitive tools." *Id.*

As a corollary to the requirement that laws regulating First Amendment activity be narrowly drawn, this Court "has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Broadrick*, 413 U.S. 601, 612. The defendant is permitted to attack the validity of the statute on its face, not simply as applied to the defendant, because an overbroad statute "also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). *See also Board of Airport Comm'rs v. Jews For Jesus, Inc.*, 482 U.S. 569, 574 (1987). In short, overbroad statutes pose "a danger of chilling free speech," *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984); "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[3] Accordingly, it is now well established that if a statute's overbreadth is substantial, "the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation." *Brockett*, 472 U.S. at 503-04. *See also Members of City Council v. Taxpayers For Vincent*, 104 S.Ct. 2118, 2125 (1984) ("The Court has repeatedly held that . . . a statute may be challenged on its face even though a more narrowly drawn statute would be valid as applied to the party in the case before it.").

The overbreadth doctrine, like many principles of constitutional adjudication, is not without some cost. In some cases, it may permit a party whose conduct could constitutionally be proscribed to avoid any sanction. In other cases, such as this, it merely prevents a particular law from being applied to that party, while leaving the State free to proceed with prosecution under other criminal laws. In either situation, however, this Court has consistently recognized that if the statute is substantially

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[3] *Broadrick*, 413 U.S. at 612.

overbroad and the overbreadth cannot be cured by a narrowing construction, invalidation is required because of the transcendent value of the First Amendment's protections. *Amici* urge the Court to reaffirm this important First Amendment doctrine in this case.

II. THE ST. PAUL ORDINANCE, BOTH ON ITS FACE AND AS CONSTRUED, IS UNCONSTITUTIONALLY OVERBROAD.

In upholding St. Paul Ordinance § 292.02, the lower court did not dispute Petitioner's contention that the plain language of the ordinance criminalizes a substantial amount of constitutionally protected speech and expressive conduct. Indeed, the lower court acknowledged that "the St. Paul ordinance should have been more carefully drafted." *In re Welfare of R.A.V.*, 464 N.W.2d at 511. The court then disregarded the express terms of the ordinance and wrote limitations into the ordinance in an effort to cure its unconstitutional overbreadth. In the discussion that follows, *Amici* will first address the substantial overbreadth of the ordinance as written, and will then demonstrate that the lower court's effort to cure this overbreadth was unsuccessful.

A. The St. Paul Ordinance, On its Face, Criminalizes a Substantial Amount of Constitutionally Protected Speech.

Section 292.02 provides that it is a criminal act to

> place on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender . . .

Several aspects of this statutory language require emphasis.

First, the statutory prohibition includes pure speech as well as expressive conduct.[4] Its prohibition includes signs, placards, and other objects that explicitly communicate ideas.[5] Furthermore, in regulating conduct because of the message it communicates the ordinance implicates First Amendment concerns. "A law directed at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires." [6]

Second, the prohibition is not limited to speech activities on public property, or on private property owned by unconsenting third persons. It encompasses all public and private property without limitation. Placing a sign on one's own property is encompassed by the plain language of the ordinance.[7]

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[4] The lower court appears to have assumed the ordinance only criminalizes conduct, and ignores the fact that the ordinance plainly applies to objects such as signs that include written communication. Because the court did not focus on this distinction, its opinion loosely describes the ordinance as regulating both conduct and "expressions of hatred." *In re Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1991).

[5] *Cf., Skokie v. National Socialist Party of America*, 69 Ill.2d 605, 373 N.E.2d 21 (1978) (reversing injunction against demonstrators who wanted to stand on public property in uniforms with swastikas, holding placards saying "Free Speech for the White Man", "Free Speech for White America", and "White Free Speech"). The expressive conduct which the Illinois Supreme Court found protected by the First Amendment—including placards and symbols that could have provoked violent reactions—would be subject to the St. Paul ordinance as construed by the lower court.

[6] *Texas v. Johnson*, 109 S.Ct. 2533, 2540 (1989) (quoting *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622-23 (1983) (Scalia, J., dissenting), *rev'd sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)) (emphasis in original). *See also Broadrick v. Oklahoma*, 413 U.S. 601, 616 (1973) (where statute regulates expressive conduct, test is whether statute is substantially overbroad).

[7] *Cf., Linmark Assocs. v. Willingboro*, 431 U.S. 85 (1977) (holding that ordinance prohibiting some owners from posting "For Sale"

Third, although in this case the ordinance is being applied to a "message of racial supremacy" and was apparently directed at members of a minority group,[8] the ordinance covers far more than hate speech directed at minority groups. There is no limitation on the subject matter of the speech, so long as it "arouses anger, alarm, or resentment in others" based on race, color, creed, religion or gender.

Although there have recently been increasing attempts to restrict speech and expressive conduct that causes resentment based on race and gender, the dangers of government regulation of this expression must be evaluated in a larger historical context.[9] During the 1960's these issues were played out in the context of efforts by white majorities, primarily in the South, to regulate speech and speech activities by blacks that offended the majority's "racial sensibilities." In *Garner v. Louisiana*, 368 U.S. 157 (1961), for example, Justice Douglas observed that "[i]n the environment of a segregated community I can understand how the mere presence of a Negro at a white lunch counter might inflame some people as much as fisticuffs would in other places." 368 U.S. at 177 (Douglas, J., concurring). *See also Edwards v. South Carolina*, 372 U.S. 229, 244 (1963) (Clark, J., dissenting) (referring to the danger of "spontaneous combustion in some Southern communities" when black citizens tried to engage in peaceful demonstrations). Thus, if the St. Paul ordinance had been in effect in the South

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and "Sold" signs on their own private property violated First Amendment).

[8] *See* 464 N.W.2d at 508 n.1 (quoting Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2365-2366 (1989)).

[9] Distinguished constitutional scholars have decried these attempts, and have noted the lessons of history. *See, e.g.*, Benno C. Schmidt, Jr., *Universities must defend free speech*, The Wall Street Journal, May 6, 1991.

during the 1950's, it could have been used to prosecute a black family for putting a sign on their front lawn demanding "Integrate all-white schools now!" That speech would certainly have "arouse[d] anger, alarm, or resentment in others on the basis of race" (and might well have provoked an unlawful reaction).

Although the emotions of the 1950's and 1960's have cooled, it remains true that debate about racial quotas, apartheid in South Africa, abortion, homosexuality, and a broad range of other issues continues to "arouse anger, alarm and resentment" based on race, religion, gender and creed. And, as this Court has repeatedly recognized, a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, *or even stirs people to anger.*" *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (emphasis added).

It is quite clear from this Court's First Amendment jurisprudence that government cannot criminalize such speech simply because it arouses anger, alarm and resentment.[10] As this Court observed in *Boos v. Barry*, 485 U.S. 312 (1988), "in public debate our citizens must

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[10] *See, e.g., Texas v. Johnson*, 109 S.Ct. 2533, 2541 (1989) (same); *Houston v. Hill*, 482 U.S. 451, 461 (1987) (same); *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971) ("Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment" of First Amendment freedoms); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) ("Any shock effect caused by the placards, remarks and peaceful marching must be attributed to the content of the ideas being expressed, or to the onlookers' dislike of demonstrations as a means of expressing dissent. But '[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'") (quoting *Street v. New York*, 394 U.S. 576, 592 (1969); *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) (Constitution "does not permit a State to make criminal the peaceful expression of unpopular views").

tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space to the freedoms protected by the First Amendment.'" 485 U.S. at 322 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)). As *Amici* will now show, the Minnesota court's construction of the ordinance is completely antithetical to this fundamental First Amendment principle and fails to cure the ordinance's unconstitutional overbreadth.

B. The Lower Court's Narrowing Construction Did Not Cure the St. Paul Ordinance's Overbreadth.

Perhaps based on its belief that Petitioner's conduct was "deplorable" and that St. Paul had "the responsibility, even the obligation" to punish this conduct, *In re Welfare of R.A.V.*, 464 N.W.2d at 508, the Minnesota court went to great lengths to overcome the ordinance's constitutional infirmity. With only passing mention of the ordinance's express language (and no discussion of its legislative history or intent), the court tried to save the ordinance by rewriting it to prohibit only speech the court believed the state could constitutionally prohibit under *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) and *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *In re Welfare of R.A.V.*, 464 N.W.2d at 510. The court then imposed general limitations on the ordinance, based on its reading of *Chaplinsky* and *Brandenburg*. 464 N.W.2d at 510-11.

The prospect of avoiding difficult constitutional questions simply by incorporating Supreme Court cases by reference into criminal laws (regardless of the law's language, history or intent) may be appealing to lower courts. Indeed, in the extreme, a lower court could simply "construe" a speech-regulating statute to prohibit only speech not protected by the First Amendment.

Although this Court will defer to a state court's construction of a state law, it must nevertheless determine

whether the construction cured whatever overbreadth problems the law otherwise had. For example, a "narrowing construction" holding that a criminal prohibition excludes "speech or expressive conduct that cannot be regulated under the First Amendment" is simply a tautology that does nothing to address the concerns underlying the overbreadth doctrine. Speakers already know that statutes and ordinances are subject to limitations imposed by the Constitution. But when a law's express terms criminalize a substantial amount of protected activity and the limitations imposed by the Constitution are not clearly spelled out, there is a substantial danger that speakers will refrain from constitutionally protected activity instead of risking criminal punishment. Although the lower court's narrowing construction does not reach this extreme, it has come impermissibly close.

Furthermore, in choosing selective language from *Brandenburg* and *Chaplinsky*, and essentially writing that language into the ordinance, the lower court ignored the contexts in which those cases were decided as well as this Court's subsequent jurisprudence. In doing so, the lower court perpetuated, rather than cured, the ordinance's constitutional infirmities.

1. *The ordinance, as construed, unconstitutionally criminalizes controversial expressive conduct and speech based solely on the audience's reaction.*

Relying on *Brandenburg*, the lower court held that the State may constitutionally "censor" a speaker any time speech covered by the ordinance *causes* "anger, alarm or resentment" that "rises to the level of 'imminent lawless action.'" *In re Welfare of R.A.V.*, 464 N.W.2d at 510. This selective incorporation of language from *Brandenburg* overlooks the important fact that *Brandenburg* was discussing speech *advocating* imminent unlawful action. Although it is well established that in certain circumstances the government may constitutionally regulate a speaker who urges imminent unlawful conduct, the

lower court's construction of the ordinance goes much further and gives the government unrestricted power to punish a controversial speaker simply because the speaker's viewpoint or ideas *cause* an unlawful reaction *even when the speaker has not urged that reaction and even when that reaction is directed at the speaker.* This construction of the statute is wholly at odds with the First Amendment.[11]

Brandenburg is part of a long line of cases addressing the government's power to regulate *advocacy* of *unlawful* acts. For example, in upholding the Smith Act in *Dennis v. United States*, 341 U.S. 494 (1951), this Court emphasized that the statute "is directed at advocacy. . . . Congress was concerned with those who advocate and organize for the overthrow of the Government." 341 U.S. at 499, 502. In the *Brandenburg* case, this Court did *not* rule—as the lower court incorrectly assumed—that a speaker can constitutionally be punished because the audience violently *disagrees* with the speaker's views and responds violently in order to *suppress* those views. To the contrary, *Brandenburg* held only that a speaker can constitutionally be punished if the speaker *advocates* unlawful action in circumstances where such unlawful action is imminent and likely because the audience *agrees* with the speaker's views.[12]

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[11] *See, e.g., Skokie*, 373 N.E.2d at 25 ("courts have consistently refused to ban speech because of the possibility of unlawful conduct by those opposed to the speaker's philosophy") (citing *Collin v. Chicago Park Dist.*, 460 F.2d 746, 754 (7th Cir. 1972)); *Dr. Martin Luther King, Jr. Movement, Inc. v. Chicago*, 419 F. Supp. 667, 674 (N.D. Ill. 1976) ("it is settled law that hostile spectators or bystanders do not justify the restraint of otherwise legal First Amendment activities").

[12] Subsequent cases have consistently recognized that *Brandenburg* was aimed at speakers who advocate, urge or otherwise direct listeners to engage in imminent, unlawful action. *See Texas v. Johnson*, 109 S.Ct. 2533 (1989) (citing *Brandenburg* to support the proposition that this Court has required "careful consideration of the actual circumstances surrounding" provocative speech, and the Court has asked "whether the expression '*is directed* to inciting or producing imminent lawless action and is likely to incite or produce such action'") (emphasis added); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927-28 (1982); *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 447-48 (1974); *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

Neither the specific facts of this case, nor the terms of the St. Paul ordinance, even as construed, have anything to do with advocacy of unlawful action. Petitioner is *not* being prosecuted for urging imminent unlawful actions by anyone else. Instead, the ordinance broadly condemns speech and expressive conduct which "*arouses* anger, alarm, or resentment." St. Paul Ord. § 292.02 (emphasis added). As construed by the lower court, "[w]here the 'anger, alarm or resentment' the ordinance speaks of rises to the level of 'imminent lawless action,' the City is permitted to intervene and censor the provocative conduct." *In re Welfare of R.A.V.*, 464 N.W.2d at 510. Thus, as construed, the ordinance criminalizes speech which may provoke imminent lawless action even if the speaker did *not* advocate unlawful action, and even if the unlawful action would be directed *against* the speaker in order to *suppress* the speaker's views.

This criminal sanction is squarely at odds with this Court's longstanding recognition that "under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969). *See* n.10 *supra.* Indeed, the construction adopted by the Minnesota court necessarily means that although a speaker cannot be punished if an offended listener responds non-violently, if the listener instead reacts violently *the speaker* can then be criminally punished! Such a rule of law would be contrary to public policy because it would encourage hostile audiences to react violently to messages they find offensive.

In a free society, controversial speech and expressive activity will necessarily prompt angry and sometimes unlawful responses. The Selma march and other freedom marches in the South during the 1960's provoked such responses. Anita Bryant's expression of views against homosexuality prompted threats of violent and unlawful responses. *See, e.g.*, Wash. Post, Section D3 (Nov. 4, 1977). And the annual Ku Klux Klan marches in Washington, D.C., have provoked violent and unlawful responses. But this Court has never held that government may punish controversial speakers as a consequence of such reactions.[13] The Minnesota court's construction of

[13] For example, in *Street v. New York*, 394 U.S. 576 (1969), this Court rejected the proposition that defendant's speech could be criminally punished because his words were so "inflammatory that they would provoke others to retaliate physically against him." 394 U.S. at 591, 592. The Court held that because the statute at issue was not narrowly drawn to punish only the "small class" of "fighting words" recognized by the Court, it violated the First Amendment. 394 U.S. at 592. Here, the lower court did *not* construe the St. Paul ordinance to be limited to "fighting words"; to the contrary, it upheld the imposition of criminal penalties under the ordinance on speech or expressive conduct that *either* was "likely to provoke imminent lawless action *or* constitute[d] 'fighting words.'" *In re Welfare of R.A.V.*, 464 N.W.2d at 510. *See also Hess v. Indiana*, 414 U.S. 105, 109 (1973) (where there was no evidence that defendant's "words were *intended* to produce, and likely to produce, *imminent* disorder, those words could not be punished by the State on the ground that they had 'a tendency to lead to violence'") (first emphasis added) (citation omitted).

In many contexts, this Court has struck down convictions where a defendant's exercise of First Amendment rights aroused "anger, alarm or resentment," which either resulted in (or created a substantial threat of) an unlawful response. *See Gregory v. Chicago*, 394 U.S. 111, 120 (1969) (overturning disorderly conduct conviction of leaders of peace march protesting segregation, where hostile hecklers had become noisy and had thrown eggs at marchers, and where policeman in charge at scene believed that onlookers were "dangerously close to rioting"); *Cox v. Louisiana*, 379 U.S. 536, 549 n.12 (1965) (reversing disorderly conduct conviction of student who led march in Louisiana protesting segregation notwithstanding testimony that "violence was about to erupt" from group of 250 predominantly white onlookers); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (reversing conviction of black protesters for "breach of peace"); *Taylor v. Louisiana*, 270 U.S. 154 (1962) (reversing conviction for disturbing the peace where black protesters violated custom segregating people in bus waiting rooms according to their race); *Garner v. Louisiana*, 368 U.S. 157 (1961) (reversing conviction for disturbing the peace where black protesters sat at white lunch counters in business establishments); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (reversing conviction for breach of the peace where controversial speaker in auditorium had attracted angry crowd of one thousand people to protest this meeting, crowd had become angry and turbulent, and there had been several disturbances); *cf. Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (Nazi demonstration in Skokie, Illinois), *cert. denied*, 439 U.S. 916 (1978); *Skokie v. National Socialist Party of America*, 373 N.E.2d 21 (Ill. 1978) (same); *Knights of the Ku Klux Klan v. Martin Luther King, Jr. Worshippers*, 735 F. Supp. 745 (M.D. Tenn. 1990); *Dr. Martin Luther King, Jr. Movement, Inc. v. Chicago*, 419 F. Supp. 667, 674 (N.D. Ill. 1976).

the St. Paul ordinance permits such constitutionally protected speech to be suppressed, and the ordinance, as so construed, continues to be overbroad.

This Court's older decisions, in *Feiner v. New York*, 340 U.S. 315 (1951) and *Cantwell v. Connecticut*, 310 U.S. 296 (1940), do not dictate a different conclusion. In *Feiner*, the Court accepted the lower court's determination that the speaker was trying to divide a racially mixed and restless crowd into hostile camps, and the Court concluded that the speaker had undertaken "incitement to riot." *Feiner*, 340 U.S. at 321. *See Edwards*, 372 U.S. at 236 (explaining limited holding in *Feiner*). The Court's decision in *Cantwell* reversed convictions for breach of the peace, but included some broad dicta concerning the scope of government authority. The Court's closing analysis, 310 U.S. at 309-10, explains, however, that in "practically all" of the earlier cases in which a breach of the peace conviction was based on provocative speech, the "language . . . consisted of profane, indecent, or abusive remarks directed to the person of the hearer." 310 U.S. at 309. As explained above, the lower court's analysis of the St. Paul ordinance goes substantially beyond speech of this sort.

2. *The lower court's attempt to incorporate the Chaplinsky standards into the St. Paul ordinance creates substantial overbreadth problems.*

Although the lower court's misapplication and expansion of *Brandenburg*, standing alone, renders the ordinance unconstitutionally overbroad,[14] the lower court's construction is constitutionally defective for a second reason. The court construed the ordinance *also* to encompass "expressive conduct that amounts to 'fighting words'—conduct that itself inflicts injury or tends to incite immediate violence." *In re Welfare of R.A.V.*, 464 N.W.2d at 510 (purporting to rely on *Chaplinsky*, 315 U.S. 568). Instead of limiting the ordinance to the small class of words that are so personally insulting as to provoke immediate fisticuffs, the lower court construed the ordinance to encompass far more speech than can constitutionally be criminalized under the "fighting words" doctrine.

This Court's prior decisions indicate that states can constitutionally criminalize "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971).[15] The Court has repeatedly made clear, however, that this authority is "limited in application, as in *Chaplinsky*, to words that have a direct tendency to cause acts of violence by the person to whom, *individually*, the remark is addressed." *Gooding v. Wilson*, 405 U.S. 518, 524 (1972) (emphasis added). In this case, however, the ordinance, *even as construed*, is *not* restricted to speech

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[14] The lower court construed the ordinance to permit suppression of all speech that could be prohibited under the lower court's mistaken interpretation of *Brandenburg or* under the lower court's understanding of *Chaplinsky*. As explained in *Point II.B.1*, the statute is substantially overbroad by virtue of the lower court's overbroad interpretation of *Brandenburg* regardless of whether the lower court correctly interpreted and incorporated the "fighting words" doctrine of *Chaplinsky*.

[15] *See, e.g., Texas v. Johnson*, 109 S.Ct. 2533, 2542 (1989).

that is "directed to the person of the hearer" (*Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940)), and would be understood by the listener "as a direct personal insult." *Cohen*, 403 U.S. at 20. The lower court's construction of the "fighting words" doctrine does not even mention, much less stress, that important limiting factor. To the contrary, the lower court describes the "fighting words" doctrine as permitting suppression of speech "that itself inflicts injury or tends to incite immediate violence," *In re Welfare of R.A.V.*, 464 N.W.2d at 510, with no requirement that the speech be directed, personally, to the recipient.[16] Ordinary citizens reading the opinion of the court below would therefore be led to believe, incorrectly, that their speech could constitutionally be punished if it inflicted injury or tended to incite immediate violence against the speaker, even if their speech was *not* directed personally to the listener. Thus, because of the lower court's partial and misleading incorporation of a *portion* of the "fighting words" doctrine, citizens will self-censor speech that could not constitutionally be suppressed, and the ordinance, even as construed, continues to be unconstitutionally overbroad.[17]

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[16] This omission does not appear to be inadvertent. For example, at another point in its discussion, the lower court noted that the ordinance was being interpreted to reach *both* "expressions of hatred *and* resorts to bias-motivated *personal* abuse." 464 N.W.2d at 511 (emphasis added).

[17] The St. Paul ordinance does *not* regulate "group libel"—it punishes speech that arouses anger regardless of whether the speech is libelous. The ordinance also does not provide any of the limitations required by this Court's First Amendment decisions relating to libel laws. *See Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188 (9th Cir. 1989) (expressing doubt about continuing vitality of group libel concept), *cert. denied*, 110 S.Ct. 59 (1989); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 331 n.3 (7th Cir. 1985) (same), *aff'd*, 475 U.S. 1001 (1986); *Tollett v. United States*, 485 F.2d 1087, 1094 (8th Cir. 1973) (same); *Anti-Defamation League of B'nai B'rith v. Federal Communications Commission*, 403 F.2d 169 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969).

The lower court's broad interpretation of *Chaplinsky* is suspect on an additional ground, as well. The lower court interpreted *Chaplinsky* as permitting suppression of "fighting words," which it described as "conduct that itself inflicts injury *or* tends to incite immediate violence." 464 N.W.2d at 510 (emphasis added). The notion that a criminal statute can be made constitutional by "limiting" its reach to words "which by their very utterance inflict injury," *id.* (quoting from *Chaplinsky*), even if those words do *not* have a tendency to incite immediate violence, should be squarely rejected by this Court. Although disjunctive language (inflict injury or incite violence) was used by the Court in *Chaplinsky*, and has been quoted in some—but not all—of the Court's subsequent cases discussing the fighting words doctrine, that broad reading of *Chaplinsky* has not, in practice, been applied by this Court.[18] In the *Chaplinsky* type cases, the Court has invoked the overbreadth doctrine, as it should do here, and has therefore found it unnecessary to consider application of the "fighting words" doctrine to the facts of the particular case. Nevertheless, although dictum, the clear trend in the language of post-*Chaplinsky* decisions is to restrict the doctrine to fighting words that do have a tendency to incite immediate violence.[19] Legal

[18] *See, e.g., Lewis v. New Orleans*, 415 U.S. 130 (1974); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Lewis v. New Orleans*, 408 U.S. 913 (1972); *Brown v. Oklahoma*, 408 U.S. 914 (1972); *Cohen v. California*, 403 U.S. 15 (1971).

[19] For example, in *Texas v. Johnson*, 109 S.Ct. 2533 (1989), the Court explained:

> Nor does Johnson's expressive conduct fall within the small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574, 62 S.Ct. 766, 770, 86 L.Ed. 1031 (1942). No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs.

109 S.Ct. at 2542. *See also Cohen v. California*, 403 U.S. 15, 20 (1971); *Gooding v. Wilson*, 405 U.S. 521, 524 (1972). Indeed, even

commentators agree that this Court has limited the fighting words doctrine to words having a tendency to incite immediate violence and breach of the peace.[20]

There is good reason to limit the "fighting words" doctrine to personal insults likely to produce imminent violence. Indeed, criminalizing speech simply because it "inflicts injury" would be inconsistent with this Court's repeated holdings that speech cannot be proscribed merely because it offends or angers the listener. *See* n.10 *supra*. In *Hustler Magazine v. Falwell*, this Court squarely rejected the proposition that offensive speech could be proscribed simply because it was labeled "outrageous":

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

485 U.S. at 55. Although this and other decisions suggest that words which "inflict injury" are not in all respects identical to "outrageous" or "offensive" words, their impact is certainly substantially similar. Given the inherent ambiguity in the phrase "words which by their very utterance inflict injury," and the absence of any defining cases in this Court in the half century since *Chaplinsky*, the lower court erred when it held that

in *Chaplinsky*, the state courts had authoritatively construed the statute at issue to regulate only words having "a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." *Chaplinsky*, 315 U.S. at 573 (quoting *State v. Brown*, 68 N.H. 200, 38 A. 731) (1895)).

[20] *See* Tribe, AMERICAN CONSTITUTIONAL LAW 929 (2d Ed. 1988); Gard, *Fighting Words As Free Speech*, 58 WASH. U. LAW Q. 531, 534 (1980). *See also* Yarbrough, *The Burger Court and Freedom of Expression*, 33 WASH. & LEE L. REV. 37, 53-54 (1976).

speech can constitutionally be suppressed whenever it "inflicts injury," *regardless* of whether it is likely to provoke an imminent lawless response. That overbroad construction of *Chaplinsky* does not sufficiently reduce the risk that constitutionally protected speech and expressive conduct will be unduly chilled by this ordinance, as construed.

CONCLUSION

The government has at its disposal a substantial arsenal of criminal statutes to punish individuals who engage in the type of conduct involved here. In deciding to prosecute Petitioner under St. Paul Ordinance § 292.02, however, the government has invoked an ordinance that impermissibly criminalizes constitutionally protected speech and expressive conduct. Prosecution under this vague and overbroad ordinance is neither required to achieve the government's interest nor permitted by the First Amendment.

In trying to save the statute by incorporation of selected portions of the language from *Brandenburg* and *Chaplinsky*, the lower court has not cured the statute's overbreadth. To the contrary, protected First Amendment speech and expressive conduct will continue to be chilled not only by the broad reach of the statute's express terms, but also by the overbroad constructions of *Brandenburg* and *Chaplinsky* adopted by the lower court. Because of the "transcendent value to all society of constitutionally protected expression," *Bigelow v. Virginia*, 421 U.S. 809, 816 (1975), this result cannot be reconciled with the First Amendment. *Amici* therefore urge the court to reaffirm the importance of the First Amend-

ment overbreadth doctrine and to reverse the judgment of the lower court.

Respectfully submitted,

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